

FILED

November 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,)	NO. 02C01-9412-CC-00265
)	
Appellee)	HENRY COUNTY
)	
V.)	HON. JULIAN P. GUINN,
)	JUDGE
TERESA DEION SMITH HARRIS,)	
)	(First Degree Felony Murder)
)	
Appellant.)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

Appellant, Teresa Deion Smith Harris, appeals as of right from her conviction for first degree felony murder. She was sentenced to life imprisonment without the possibility of parole by a Henry County jury, after a change of venue from Carroll County. Appellant raises thirteen issues in her brief. She argues that:

- (1) the indictment was improper because it failed to charge the appellant with criminal responsibility where the judge instructed the jury on this accomplice liability;
- (2) since the jury was instructed on the law regarding criminal responsibility, criminal facilitation should have been charged as a lesser included offense;
- (3) the admission of post-death facts was error and denied the appellant a fair trial;
- (4) the trial court improperly sentenced appellant to life without parole for three reasons:
 - (a) the failure of the jury to completely fill in the verdict form with all the elements of the first aggravating factor;
 - (b) the second aggravating factor found by the jury subjects appellant to double jeopardy because it is inherent in the offense; and
 - (c) the trial court failed to send the jury back to deliberate further upon their announced erroneous findings;
- (5) the trial court conducted voir dire in a manner inconsistent with Rule 24 of the Rules of Criminal Procedure;
- (6) the trial court erroneously allowed application of the “especially heinous, cruel or atrocious” aggravating factor;
- (7) the trial court erroneously allowed application of the “avoiding, interfering with or preventing an arrest or prosecution” aggravating factor;
- (8) the trial court erred in allowing the district attorney to exercise his discretion to pursue a charge of first degree murder;
- (9) the district attorney made improper comment during closing statement of the guilt phase;
- (10) the district attorney made improper comment during closing argument at the sentencing phase;
- (11) trial judge erred in not recusing himself due to partiality towards a State’s witness;
- (12) the trial court erred in failing to suppress statements made by appellant; and

(13) the trial court denied certain citizens their right to serve on a jury based on their religious reservations about imposing the death penalty.

We find that no reversible error was committed by the trial court in regard to any of these issues. We therefore affirm the appellant's conviction of first degree felony murder and her sentence of life imprisonment without parole.

FACTS

On July 30, 1993, appellant, her live-in boyfriend, Walter Smothers¹, and neighbor Stacy Ramsey spent the day at appellant's house drinking tequila, whiskey, and beer, and smoking marijuana. Testimony indicated that excessive amounts of alcohol were consumed by all. The proof showed that Smothers was also taking Valium. Throughout the day, appellant's ex-boyfriend, David Hampton, had called her residence several times. Smothers had occasion to answer the phone once and he argued with Hampton about appellant. It was decided that they would meet and fight in order to settle the matter. There was conflicting testimony about when this fight was to occur. Appellant told Smothers that she "would like to get him [Hampton]", apparently because Hampton had been abusive to her in the past. Later that evening, Smothers and appellant decided to go to Hampton's house. They asked Ramsey to go with them and Smothers told him to bring his shotgun. Appellant testified that she heard Smothers say this. Ramsey got his .20 gauge shotgun and the trio headed out in his old model pickup truck. Appellant knew the shotgun was in the truck when they left.

After dropping appellant's two young children at their grandmother's house, the three drove around Carroll County for a while, drinking and looking for Hampton's house. Appellant testified that she knew exactly where Hampton's house was located, but was afraid to lead Smothers there. At one point, they stopped in Yuma and tried

¹Smothers pled guilty to first degree murder in exchange for a life sentence without the possibility of parole. He then testified at appellant's trial as a witness for the State.

to buy some oil for Ramsey's ailing truck. However, all the stores were closed. They continued in their search for Hampton's house. On Highway 114 near Hollow Rock, the truck broke down and the trio was stranded. It was decided among the three that they would stop the next vehicle on the road and take it from the driver so they could have a ride. Smothers testified that they also discussed the possibility that they would have to kill the person they stopped. However, appellant denied that they ever had such a discussion.

Smothers urged appellant to step into the road and flag down the next vehicle because she was a young woman and a vehicle would surely stop for her. When the headlights of an approaching car were visible, appellant got out of the truck and flagged down the vehicle. It was a small pickup truck driven by nineteen-year-old Dennis Brooks, Jr., who had just gotten off work at Subway and was traveling home. Testimony reflected it was about 12:30 a.m. When the truck stopped, Ramsey and Smothers emerged from behind Ramsey's truck, where they had been hiding. While holding the shotgun on Brooks, Smothers ordered him out of the truck and Ramsey threw him to the ground. Appellant ran up to him, hit him two or three times in the back and told him to lie down and cursed him. Appellant claimed that she did this in an effort to make him be quiet so that Smothers would not hurt him. This commotion was loud enough to be heard by residents of a nearby home who were awakened by the shouting.

Smothers demanded money from Brooks, took his wallet and made him get in the back of his pickup. Appellant and Ramsey got in the cab of the truck and Ramsey began to drive. Smothers then decided to get into the front of the truck. He told Ramsey to slow down and told appellant to hold the gun on Brooks while he moved into the front. Appellant turned around in the seat and held the gun on Brooks through the truck's sliding glass rear window. Testimony diverges as to what occurred next. Smothers testified that while appellant was holding the gun, he told Ramsey to speed up. As he did so, the truck jerked and the gun went off, shooting Brooks in the hip.

According to appellant's testimony, she had given the gun back to Smothers, turned back around in the truck seat and then heard the gun go off. Appellant stated she did not see the gun go off, but turned around when she heard it and Smothers told her it was an accident.

Undaunted, Ramsey continued to drive the truck, still searching for Hampton's house. Appellant testified that Smothers said they would take Brooks to the hospital. Nothing else in the record corroborates this intent, which their subsequent actions belied. When Brooks saw the lights of the next town, he began screaming for help. Afraid that someone would hear Brooks, Smothers put the gun under his chin and fired. According to Smothers' testimony, either somebody or a voice inside his head told him to shoot the victim. Appellant testified that she and Ramsey were shocked by this and did not know what was happening. While speeding through Hollow Rock, they were pursued by a police officer. However, they were able to evade the officer and eventually traveled back to appellant's house.

The trio first decided to bury the body and the truck because they had access to a backhoe. However, this plan was thwarted when they learned that the backhoe had a flat tire. While at appellant's house, they collected several items, including a shovel and an ax. Appellant brought a large butcher knife from her kitchen to add to the collection. They then drove the truck to a deserted area and mutilated Brooks' body. Medical evidence at trial showed that both of Brooks' legs were severed, as well as his right arm and penis. In addition, his body had been stabbed multiple times. The chest cavity had also been cut open and his heart removed. The heart was found inside the abdominal cavity. Smothers testified that all three participated in the mutilation. Smothers and Ramsey each cut off one leg and Ramsey severed the arm. Appellant admitted to stabbing the body. Smothers also stated that appellant "said she wanted his heart" and he removed it at her request. Each of them held the heart and pressed it to their lips. Appellant denied all participation in the mutilation, except stabbing the body once at Smothers' direction. She said that she held the heart and

touched her lips to it only because Smothers instructed her to do so. Medical testimony also proved that either shot was sufficient to cause death of the victim. The mutilation conclusively occurred post-death.

After these events, the three went back to appellant's house again and gathered gasoline and lantern fuel to burn the body and the truck. Neither Smothers nor appellant could remember how they reached this decision. Ramsey and Smothers drove in Brooks' truck and appellant followed in her own car. They drove the truck from Langford Store Road into an empty field and set it on fire with the mutilated body inside the cab. Proof at trial also showed that they removed the radio and speakers from the truck, as well as several personal items belonging to the victim², before burning the truck. Appellant then drove them back to her house where they all showered and she washed their clothes. The day following the night of the murder, appellant and Smothers returned to the scene and set the truck afire again because it had not completely burned. That day the trio also made up a story about the previous night's events, "partied" at Ramsey's house and went out drinking at Casey's Bar. The owner testified to their presence at the bar starting at about 8:00 p.m. He described appellant's behavior as more active than usual. She was playing pool and singing with the jukebox. In addition, the evidence indicated that appellant was wearing a hat and sunglasses that night, which were later identified as belonging to Brooks.³

By this time, Brooks' parents had reported their son missing. While searching for Brooks and his truck by helicopter, police spotted the burning truck and an investigation followed. Rather quickly, the police and TBI agents were able to determine Brooks' fate and were led to the three perpetrators. All three were arrested and charged with first degree premeditated murder and felony murder. They were

²These items were later recovered from appellant's house after she consented to a search.

³When co-defendant Ramsey was arrested, he was wearing the victim's black tennis shoes.

indicted by the Carroll County grand jury in September of 1993. The State filed a notice to seek the death penalty against the defendants.

Upon the request of each defendant, the trial court severed the action and ordered three separate trials, with appellant's trial being held first. In addition, a change of venue was granted due to pretrial publicity. The actions all occurred in Carroll County, but appellant's trial was held in Henry County. At the bifurcated trial, the jury first found appellant guilty of first degree felony murder. After hearing evidence at the sentencing phase, the jury sentenced the appellant to life imprisonment without parole. Pursuant to Tennessee Code Annotated section 39-13-204, the verdict included the jury's finding of two aggravating circumstances necessary to support enhanced punishment. The jury found: "the murder was especially heinous and cruel" and "the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another."

1. CHALLENGE TO THE INDICTMENT

Appellant argues that the indictment was improper in that it did not charge her with criminal responsibility for the murder of Dennis Brooks, Jr., but that the trial judge charged the jury with this accomplice liability in his instructions. We find this issue is without merit. A proper indictment in this state must: (1) inform the defendant of the precise charges; (2) enable a trial court upon conviction to enter an appropriate judgment and sentence; and (3) protect the defendant against double jeopardy. State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996). Necessarily included in these requirements is the due process guarantee that the indictment must provide the accused a fair opportunity to defend against the charges. Id. See also State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993) (an indictment must

sufficiently apprise the defendant of what he must be prepared to meet). These requirements and due process guarantees were met by the indictment in this case.

The indictment charged that appellant “did unlawfully knowingly or recklessly kill Dennis Brooks, Jr. during the perpetration of a felony, to-wit: kidnapping, robbery or theft, in violation of T.C.A. 39-13-202(a)(2).”⁴ The indictment clearly charged appellant as a principal in the crime of felony murder. The evidence adduced at trial is sufficient to support her actions as such. It was disputed whether appellant fired the first shot that could have killed the victim; however, such proof is not necessary to sustain a conviction for felony murder. A defendant who is a willing and active participant in a felony becomes accountable for all of the consequences and may be convicted of first-degree murder where a co-perpetrator of the felony is the actual killer. State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992). See also State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App. 1988), cert. denied, 498 U.S. 834, 111 S.Ct. 102, 112 L.Ed.2d 73 (1990) (in felony murder, all defendants are responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the others).

Under the felony-murder doctrine, appellant can be convicted of first degree murder because she willingly participated in the felony. She assisted Smothers and Ramsey in stealing Brooks’ truck. It is not necessary that she commit the actual murder. Her liability flows from the intent to commit the felony. Brown, 756 S.W.2d at 705. The conviction was for appellant’s role as a principal, not as an accomplice. Appellant suffered no prejudice from the instruction and it was harmless error for the judge to charge the jury on criminal responsibility. The indictment informed her of the precise charge and she was convicted of that charge. She is also protected from double jeopardy for this crime. The indictment satisfied the constitutional and statutory prerequisites and was not improper in any way.

⁴Appellant was also indicted for the first degree premeditated murder of Brooks. However, at trial, the State elected to proceed only on the felony murder count.

A very similar issue was raised in State v. Brown, supra. The defendant had been indicted for armed robbery, first degree (premeditated) murder and felony murder. The trial court instructed the jury on aiding and abetting (the equivalent of the present criminal responsibility statute) even though the defendant had not been explicitly indicted for aiding and abetting. This Court found no error in the instruction. 756 S.W.2d at 704. Similarly, we find no error in the trial court's instruction on criminal responsibility where the indictment did not so charge.

2. ERROR IN JURY INSTRUCTIONS

Next, appellant argues that the trial court should have charged the jury on criminal facilitation after instructing the jury on criminal responsibility. Her contention is that it was warranted as a lesser offense. It is a well-settled principle of law that an instruction on a particular charge must be given to the jury only if evidence in the record would support a conviction for the lesser offense. State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996) (citations omitted). See also State v. Hicks, 835 S.W.2d 32, 36 (Tenn. Crim. App. 1992) (instruction on criminal facilitation should be given where its application is fairly raised by the evidence). Where there is no proof in the record which would support the instruction, a defendant is not entitled to the instruction. Trusty, 919 S.W.2d at 311. Such is the case here. The record is devoid of any evidence to support a conviction for criminal facilitation and no instruction was warranted.

Under our criminal statutes, "a person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under §39-11-402(2), the person knowingly furnishes substantial assistance in the commission of a felony." Tenn. Code Ann. §39-11-403(a) (1991). In contrast, however, the record before us is replete with evidence to support the appellant's principal role in the crime.

Testimony indicated that appellant was an active participant in the events leading up to the victim's murder. Appellant began the whole ordeal when she stopped Brooks in the road that night. She admitted that after Ramsey threw Brooks onto the ground, she hit him in the back several times and cursed him. In addition, she kept the gun trained on Brooks as he lay in the back of the truck. Although she denies having control of the gun when the first shot went off, Smothers testified that the first shot into Brooks' hip occurred while appellant was holding the gun on him. Appellant was clearly more than a mere facilitator. Where the record clearly shows that the defendant was guilty of the greater offense, it is not error to fail to charge the jury on a lesser offense. State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991). This issue is without merit.

3. ADMISSION OF POST-DEATH EVIDENCE

Appellant also contends that the admission of post-death evidence was error and denied her a fair trial. She argues that she was not indicted for any post-death acts and the evidence was immaterial to prove the crime of murder. Specifically, appellant argues that the probative value of the evidence was substantially outweighed by the danger of prejudice. Because we believe the evidence was relevant to prove the appellant's participation in the events, we affirm the trial court's ruling.

In order for evidence to be relevant, it must have a tendency to make the existence of any material fact more or less probable than it would be without the evidence. See Tenn. R. Evid. 401. Under Rule 402, all relevant evidence is generally admissible. Here the post-death evidence was relevant in that it made the material fact of appellant's participation more probable. Tenn. R. Evid. 402. In his opening statement, counsel for the appellant advised the jury that her theory was that she was

“in the wrong place at the wrong time” and she did not actively participate in the crime. At that point, evidence relating to her actions preceding the death and following death became relevant to prove appellant’s role in the crime. This is especially true with felony murder where participation in the felony and surrounding events make an actor culpable. All of appellant’s actions prior to the murder and following the murder were essential to prove she was not a mere bystander. This evidence made her participation more probable and therefore relevant.

Of course, if the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, then the evidence is deemed inadmissible. Tenn. R. Evid. 403. This is the crux of appellant’s contention. However, we are inclined to agree with the trial court’s ruling on this issue. The probative value of the post-death evidence was not substantially outweighed by the danger of prejudice.

In reaching this conclusion, we believe it is useful to rely upon the analysis employed when the admissibility of gruesome photographs is challenged. Although appellant does not challenge the introduction of any photographic evidence, these principles readily apply to the gruesome testimony offered about mutilation of the victim’s body. Generally, a court’s decision to admit photographs is discretionary and will not be reversed absent a clear showing of abuse of discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). See also State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994) and State v. Harbison, 704 S.W.2d 314 (Tenn. 1986), cert. denied, 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986). Based on that standard, we do not find that the trial court abused its discretion in permitting the jury to hear the evidence.

There is no question that the post-death evidence was gruesome and repulsive. The medical testimony included evidence about several severed body parts and the removal of an internal organ. However, this evidence was relevant to prove the appellant’s involvement in the overall crime, not just the killing. It is true that the

post-death facts are not necessary to prove the actual murder. Nevertheless, it *is* relevant to demonstrate the appellant's role in the crime of felony murder. Appellant's participation in the post-death events was clearly established. It was also shown that she had opportunities to escape before the mutilation and burning. Her willing participation, evidenced by her voluntary accompaniment of Smothers and Ramsey, made the introduction of such proof necessary. Contrary to her defense, it was not just a matter of being in the wrong place. Furthermore, such evidence was necessary to explain the physical evidence found at appellant's home and to substantiate the chain of events. The risk of prejudice was simply not substantial enough to outweigh the great probative value of this evidence. We find no abuse of discretion on the part of the trial judge in allowing the post-death evidence to be admitted.

4. INCOMPLETE JURY STATEMENT OF AGGRAVATOR

Appellant's fourth issue attacks the jury's verdict of life imprisonment without parole. She alleges that the jury failed to completely enumerate the first aggravating circumstance on the verdict form. The verdict form returned by the jury lists the first aggravating factor as "the murder was especially heinous and atrocious." It omitted the remaining statutory language of this aggravating factor: ". . . or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." See Tenn. Code Ann. §39-13-204(i)(5) (Supp. 1995). The appellant contends that, at the very least, this requires a new sentencing hearing. However, we find no error and affirm the verdict in this respect.

There is no issue here with respect to the charge given the jury by the judge. In fact, the record reflects that the jury instructions were a full and accurate instruction on the applicable law, including that on statutory aggravating factors. We must presume then, absent clear and convincing evidence to the contrary, that the jury followed those instructions. See State v. Newsome, 744 S.W.2d 911, 915 (Tenn.

Crim. App. 1987). See also State v. Vanzant, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983) (the presumption is that a jury follows the instructions of the court) and Craig v. State, 524 S.W.2d 504, 508 (Tenn. Crim. App. 1974) (there is a presumption that a jury does not disregard the trial court's instructions). It follows then that the jury must have found that the evidence supported application of the aggravator, regardless of the omission of statutory language. Based upon the instructions provided, the jury could only apply the aggravator if it found that the murder was especially heinous, atrocious or cruel. Nothing in the record reflects that the jury did not follow the law as instructed. The omission of the complete statutory language is not the clear and convincing evidence required to overcome the presumption.

Moreover, when the jury made its report, no objection was made by appellant as to the inadequacy of the finding. The appellant did not properly preserve the issue and it is waived on appeal. State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) and Tenn. R. App. P. 36(a). Had an objection been made, the court could have prevented any confusion by returning the jury to deliberate if the court felt the verdict was incomplete. See State v. Nichols, 877 S.W.2d 722, 730 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995) (citations omitted) (when the jury reports an incorrect or imperfect verdict, the trial court has both the power and duty to return the jury to deliberate and reconsider their verdict). See also State v. Smith, 836 S.W.2d 137, 143 (Tenn. Crim. App. 1992) (if the trial court considers the jury's verdict unclear, it should request the jury to return to deliberations with a direction to amend the verdict and put it in proper form.) Therefore, we find no merit to appellant's issues 4(a) and 4(c). We defer discussion of issue 4(b), which is synonymous with issue 7.

5. JURY SELECTION PROCEDURE

As appellant's fifth issue, she argues that the trial judge violated Rule 24(c) of the Rules of Criminal Procedure. Specifically, appellant attacks the procedure followed by the trial court after a preliminary voir dire session. Initially, the trial court permitted voir dire only on pretrial publicity and the jurors' views on the death penalty. After excusing certain jurors for cause, the court instructed counsel that it would seat twenty jurors in the box for further voir dire. The number approved by the Rules is twelve. Tenn. R. Crim. P. 24(c). The judge assured counsel that their respective peremptory challenges would not be adversely affected by this method. Appellant objected to the method and argues that it prejudiced her. Although the jury selection procedure employed was not in accordance with the Rules of Criminal Procedure, we find that the error was harmless.

In order for a defendant to sustain a challenge to the selection of the jury, she must demonstrate that she suffered prejudice or purposeful discrimination. State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993). Prejudice will not be presumed. Id. Appellant simply has not carried this burden. She is unable to show that she suffered any disadvantage when the judge put twenty prospective jurors in the box instead of twelve. When the appellant objected to the voir dire method, the trial court inquired as to what disadvantage the appellant would suffer under the procedure. Appellant replied that information from such a number would be unmanageable and the jurors would not be as responsive in a large group. However, appellant is unable to show at any place in the record that in fact voir dire became unmanageable or that the jurors were unresponsive. Neither can she show that her peremptory challenges were adversely affected. In fact, the appellant chose not to use all of her allotted challenges.

In further support of our holding is State v. Coleman, supra, where a defendant objected to a very similar procedure employed by the trial court. The court there held that appellant was unable to show prejudice where the court put eighteen prospective jurors in the box instead of twelve. 865 S.W.2d at 458. Similarly,

appellant cannot demonstrate prejudice. It is true, as appellant asserts, that the court in Coleman admonished that any future deviation from the rule could constitute prejudice to the entire judicial process. Id. We, too, caution the trial court and admonish against the future use of the procedure, but without a showing of prejudice, the error was harmless. This issue is without merit.

6. “HEINOUS, ATROCIOUS, OR CRUEL” AGGRAVATOR

Appellant’s sixth issue attacks the application of the “especially heinous, atrocious, or cruel” aggravating factor enumerated in Tennessee Code Annotated section 39-13-204(i)(5). She argues that absent the consideration of any post-death facts, the proof simply did not support the aggravating factor. As such, her challenge is to the sufficiency of the evidence. The well-known standard in determining the sufficiency of the convicting evidence is “whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The State is afforded the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Applying that standard, we find the proof is overwhelmingly sufficient to uphold the jury’s application of this aggravating factor.

Most of the case law interpreting the heinous, atrocious or cruel aggravating factor developed prior to 1989 when the statutory language was somewhat different. See State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), cert. denied, _____ U.S. ____, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994); State v. Williams, 690 S.W.2d 517 (Tenn. 1985); State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); and State v. Dicks, 615 S.W.2d 126 (Tenn. 1981). In those cases, the aggravator was interpreted in light of the statutory language requiring torture or depravity of mind. As interpreted, a murder

could be heinous, atrocious or cruel by showing that it involved torture or depravity of mind. Id. The current statute, which was in effect at the time of appellant's trial, reads: "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." Tenn. Code Ann. §39-13-204(i)(5) (Supp. 1995). The depravity of mind language has been omitted. "Heinous, atrocious, or cruel" are now narrowed and defined by the requirement that the act involve torture or serious physical abuse beyond that necessary to produce death. State v. Richard Odom, No. 02-S-01-9502-CR-00014 (Tenn. at Jackson, June 3, 1996), slip op. at 18. Torture is defined as the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Id. (citing State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985)). Serious physical abuse is something different from torture. Id. Serious is a matter of degree; the abuse must be physical, not mental, and it must be more than what is necessary to produce death. Id.

Based upon the interpretation of the current aggravator, it is evident that the jury could have found these elements beyond a reasonable doubt. The proof demonstrated that appellant and her cohorts stopped the victim's truck, forcibly threw him to the ground, held a gun on him and hit him numerous times. After forcing the victim into the back of the truck, the perpetrators shot him in the hip. Wholly undeterred by this action, they continued on their journey and did not seek medical attention for the young man. During this time, the victim was fully conscious and medical testimony reflected that the hip wound would have caused excruciating pain. The victim cried out in pain after being shot and callously they yelled at him, ordering him to shut up. After driving around for 20-30 minutes, they approached the next town. Upon seeing lights, the victim began to scream for help. The perpetrators ordered him to be quiet and then Smothers placed the shotgun under the young man's chin and fired. He received all this in return for stopping to help a woman alone on a deserted road, a simple gesture of kindness.

Medical testimony at trial indicated that the gunshot wound to the victim's hip was enough to cause death, mostly due to the tremendous amount of blood loss caused by severed arteries. The second shot was not necessary to kill the victim. Thus, the jury could have considered the shot to the head as serious physical abuse beyond that necessary to produce death. Furthermore, the jury was justified in considering it extremely cruel that the perpetrators consciously chose not to seek medical attention when death was not immediate from the first shot. They let him suffer and writhe in pain with complete inhumanity. The perpetrators' indifference to the victim's extreme pain and suffering could easily have been considered by the jury to be heinous, atrocious or cruel. Thus, the strongest legitimate view of the evidence clearly supports the jury's verdict.

We note that several cases have held that gunshot wounds which cause instantaneous death do not warrant application of the heinous, atrocious or cruel aggravating factor. See State v. Van Tran, 864 S.W.2d 465, 478 (Tenn. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994); State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985); and State v. Pritchett, 621 S.W.2d 127, 139 (Tenn. 1981). But see State v. Black, 815 S.W.2d 166, 183-84 (Tenn. 1991) (the jury could have found a brutal execution style murder of a helpless child who could not protect herself evinces torture or depravity of mind). From the proof in this case, it is clear that instantaneous death did not occur. After the first shot, the victim was very much alive, conscious and suffering from extreme pain. Medical testimony indicated that after such a wound, the victim would be conscious, oriented as to time and place and aware of the circumstances and what had happened. He was forced to endure this while the appellant and her cohorts traveled several miles. It wasn't until Smothers fired the second shot into the head that immediate death occurred. This distinguishes appellant's case from the above-cited cases. The proof supports the jury's application of this aggravating factor. Appellant's argument on this issue is meritless.

7. “AVOIDING ARREST OR PROSECUTION” AGGRAVATOR

In a similar attack, appellant argues that the evidence is insufficient to support the application of the aggravating factor found in Tennessee Code Annotated section 39-13-204(i)(6). This statute allows the jury to impose enhanced punishment if it finds that “the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.” Tenn. Code Ann. §39-13-204(i)(6) (Supp. 1995). Because we find that a rational trier of fact could have found the essential elements of this aggravator, we affirm the jury’s verdict in this respect.

In one of the few cases interpreting this aggravator, the supreme court stated that it is sufficient that the proof supports a finding that at least one motive for the killing was the threat of defendant’s apprehension. State v. Smith, 868 S.W.2d 561, 580 (Tenn. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 417, 130 L.Ed.2d 333 (1994). Here it is abundantly clear that the jury’s verdict was supported by the evidence, especially when viewed in the light most favorable to the State. After the first shot, the victim began to scream when the lights of the next town were visible. It was then that Smothers fired the second shot into the victim’s head. It is reasonable for a jury to infer that Smothers shot the victim to prevent his screams from being heard by others in the town so as to avoid the risk of apprehension. In light of Smith, it is irrelevant if Smothers had additional motives for the shooting.

Furthermore, on cross-examination, the appellant testified that Smothers said he shot him because he was afraid somebody would hear him and they would get caught. The timing of the second shot itself supports the inference that it was done to avoid detection, but when coupled with appellant’s testimony, its plausibility becomes even more apparent. Because the State is entitled to all reasonable and legitimate inferences which may be drawn from the proof, State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978), we find that this aggravator was supported by the proof.

Appellant incorrectly contends that this aggravator necessarily contains a premeditation aspect. The cases cited for this proposition are not on point. From the plain language of the statute, the only requirement is that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §39-13-204(i)(6) (Supp. 1995). The Smith case confirms this plain meaning. The statutory language does not include an element of premeditation or a specific intent. Appellant's strained argument is not well-taken. Appellant also argues that the only evidence to support this aggravating factor was the uncorroborated testimony of an accomplice. The record is replete with evidence to corroborate the testimony of co-defendant Smothers.

As part of this issue, appellant contends that she cannot be held liable on this aggravator because she did not commit the murder of the victim. Such a statement is simply not true in a felony murder conviction. This contention has already been discussed in the first issue.

Appellant makes another untenable contention in her argument. She asserts that this aggravator is unconstitutional in a felony murder conviction because killing the victim to prevent reporting of the felony is inherent in every felony murder. Her belief is that every murder committed in perpetration of a felony is done to prevent arrest or prosecution. Accordingly, as an element of the crime, application of this aggravator would violate the rule of State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). Such an assertion is factually untrue. The killing that occurs in perpetration of a felony is not necessarily done to prevent arrest or prosecution. There may be any number of reasons that the murder was committed. It does not follow that we can assume such a purpose for every felony murder. These contentions have no merit; application of the aggravator was proper.

8. PROSECUTORIAL DISCRETION

Appellant's next issue attacks the district attorney's decision to pursue a charge of first degree murder. The gist of the argument is that the district attorney could easily have charged the appellant with criminal facilitation of felony murder and his decision to do otherwise was error. Appellant cites no authority for this proposition and we find no requirement that a prosecutor must charge a lesser offense when evidence is present to support a greater offense. In fact, the authority is directly contrary to this. The attorney general's broad discretion includes whether the prosecution should be dismissed or whether the offense should be reduced to a lesser included offense. State v. Turner, 919 S.W.2d 346, 350 n.2 (Tenn. Crim. App. 1995). See also State v. Gilliam, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995) (citations omitted) (the decision of whether to prosecute and what charge to file or bring before a grand jury rests within the prosecutor's discretion). The courts are not to interfere with the free exercise of this discretionary authority. Gilliam, 901 S.W.2d at 389. Clearly, the decision to pursue the charge of first degree murder was within the district attorney's discretion and amply supported by the facts. Thus, we find no merit in this contention.

9. IMPROPER ARGUMENT DURING GUILT PHASE

Appellant's next issue is the alleged improper argument of the district attorney during closing argument at the guilt phase of the trial. In that closing argument, the district attorney stated ". . . he who runs with the pack shares in the kill." This single comment is the only portion of this lengthy argument to which the appellant objects. Although the statement likely gave the jury a sharp visual image to relate to the alleged crime, it is peculiarly applicable in the context of felony murder. We find the appellant suffered no prejudice from the graphic comment.

In reviewing such an issue, it is necessary to determine whether the improper conduct could have affected the verdict to the prejudice of the appellant. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976) (citing Harrington v. State, 385 S.W.2d 758 (Tenn. 1965)). In order to determine prejudice, five factors are considered: (1) the conduct in light of the facts and circumstances of the case; (2) any curative measures taken by the court; (3) intent of the prosecutor in making the statement; (4) the cumulative effect of the improper conduct and other errors in the record; and (5) the relative strength or weakness of the case. Id. See also State v. Williams, 657 S.W.2d 405, 413 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984).

Applying the test to the facts here, no prejudice resulted from the district attorney's comment. When viewed in light of the facts and circumstances, the statement was not inherently improper. It was merely a description of the murder scene. No curative measures were undertaken, but none were needed. The intent of the prosecutor was probably nothing more than an attempt to visualize the scene for the jury. Nothing else in the district attorney's argument was improper so there was no danger of cumulative effect. Finally, this was not a close case. The appellant had admitted, to a degree, her involvement and the State's case was strong. We conclude that the comment was fully within the district attorney's role to pursue the State's case with thoroughness and vigor. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). When coupled with the principle that argument should not be unduly restricted and courts should give wide latitude to counsel, Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975), appellant's argument is meritless.

10. IMPROPER ARGUMENT AT SENTENCING PHASE

Appellant also attacks the district attorney's closing argument at the sentencing phase. She maintains that the argument was a "veiled proffer of

vengeance” and this is an impermissible argument. The appellant does not specify any particular portion of this relatively brief argument. It is true that our supreme court has counseled against an appeal to vengeance in a district attorney’s argument. See State v. Bigbee, 885 S.W.2d 797, 812 (Tenn. 1994). However, in reading the district attorney’s argument, we find no attempt to urge the jury to vengeance. This issue is without merit.

11. TRIAL JUDGE’S RECUSAL

Appellant next maintains that the trial judge erred by failing to recuse himself for partiality toward a State’s witness. She contends that certain statements made in open court about a testifying Tennessee Bureau of Investigation agent demonstrated the judge’s partiality in this case. This, according to appellant, was sufficient to require recusal. We disagree.

When a motion to recuse is made, it is addressed to the sound discretion of the trial court. State v. Hurley, 876 S.W.2d 57, 64 (Tenn. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 328, 130 L.Ed.2d 287 (1994) (citations omitted). See also State v. Cash, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993). It should only be granted where the judge’s impartiality might reasonably be questioned. Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). The issue to be determined is not the propriety of the judicial conduct, but whether the judge committed an error which resulted in an unjust disposition of the case. Hurley, 876 S.W.2d at 64. From a reading of the record, we do not believe an objective view of the circumstances necessitates recusal. See Alley, 882 S.W.2d at 821(a trial judge must consider a motion to recuse objectively as well as subjectively).

The alleged improper comments of the trial judge occurred at the suppression hearing to decide the admissibility of appellant’s statement. The primary witness in that hearing was TBI agent Alvin Daniels, an experienced field agent who had

appeared before the trial judge on numerous occasions. Agent Daniels was quite ill, as he had recently been diagnosed with cancer and was undergoing chemotherapy. Since Agent Daniels' illness could prohibit him from attending the trial, his testimony was preserved for trial. Upon conclusion of the evidence at the hearing, the judge denied the motion to suppress. Only after rendering his decision on the motion, did the judge undertake to comment on Mr. Daniel's veracity:

“Lastly, and perhaps as an aside this Court cannot set aside, perhaps some 30 years of knowledge of having heard Agent Daniels testify, since he first started as a youngster. He is peculiarly talented, and uncommonly straightforward. This man doesn't have a dishonest bone in his body. You couldn't beat a lie out of him. I have seen him let cases drop out from under him, before he would even discolor testimony. I think what he testified to, is precisely what happened out there that day, and I think that he established the voluntary giving of this statement.”

While this Court does not condone the statements made by the experienced trial judge in this case, we are unable to find that it demonstrated a prejudice or bias which led to an unjust disposition of the case. The case was tried before a jury which rendered an impartial verdict based upon the evidence. The statement could not have improperly influenced a jury because this conduct occurred at a pretrial hearing. Nothing in the record demonstrated any improper rulings, remarks or conduct at trial by the judge that could be attributed to partiality. See Hurley, 876 S.W.2d at 64. We believe the comments were meant to be a tribute to a man in poor health whom the judge held in high regard. Although improper in a court setting, we find the appellant suffered no prejudice as a result. It is important to remember that not every bias, partiality, or prejudice merits recusal. Alley, 882 S.W.2d at 821. Thus, the comments were harmless error and the issue is overruled. Tenn. R. Crim. P. 52(a).

12. SUPPRESSION OF STATEMENT

Appellant maintains in her twelfth issue that the trial court committed error in denying the motion to suppress her statement. Appellant alleges that law

enforcement officials failed to timely administer Miranda warnings and that her statement was involuntarily given. Purportedly, this rendered her statement inadmissible. The focus of the appellant's lengthy argument here is on the determination of "custodial interrogation." Finding no error by the trial court on the motion, we uphold its ruling.

The trial court's ruling on a motion to suppress will not be disturbed unless the evidence preponderates against its finding. State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980). Whether or not police questioning is custodial interrogation is primarily a fact-based question and the trial court's findings have the weight of a jury verdict. See State v. Tate, 615 S.W. 2d 161, 162 (Tenn. Crim. App. 1981). A review of the transcript from the suppression hearing reveals that the evidence amply supported the judge's admission of the statement.

The relevant inquiry in determining custodial interrogations is "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." State v. Joe L. Anderson, No. 02-S-01-9511-CC-00121 (Tenn. at Jackson, September 16, 1996), slip op. at 11. This is an objective test from the perspective of the suspect and the subjective view of law enforcement officials that the individual is or is not a suspect does not bear upon the question. Id. Some of the relevant factors in this factual determination are the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; and any interactions between the officer and the suspect. Id. at 9.

The totality of the circumstances surrounding appellant's statement do not lend themselves to a conclusion of custodial interrogation. Officials went to appellant's home the day after the murder. They were led to her based upon

information given by co-defendant Stacy Ramsey. The officers went to appellant's house, asked to speak with her and talked with appellant on her front porch. The time was around 9:30 or 10:00 a.m. The questioning lasted approximately an hour. The TBI agent who questioned appellant stated that he spoke with her in a normal tone of voice and that he was not "smart" with her. He made the statement that "now was the time for her to talk." Appellant was not transported to the police station, but rather permitted to remain at her own home. There were four law enforcement officials present, but two of them were questioning Smothers inside the house. Appellant was not confined; she was permitted to move to the front porch from inside when she expressed a fear that Smothers would hear what she had to say. No one indicated that she was not free to leave. At the first mention of incriminating statements, the officers administered Miranda warnings. Under a totality of the circumstances, these facts are more than sufficient to support the trial judge's ruling on this motion. The trial court is especially suited to make this factual inquiry, Anderson, slip op. at 10, and we find no error. The record also supports the ruling that the statement was voluntarily given. Appellant's issue has no merit.

13. JURORS EXCUSED FOR RELIGIOUS BELIEF

Appellant's final issue is an alleged constitutional violation of Article 1, section 6 of the Tennessee Constitution. She asserts that the excusal of certain prospective jurors for cause based upon their religious beliefs regarding the death penalty violates the prohibition against a religious test for jurors. In light of prior holdings of our supreme court, we find no error.

In State v. Bobo, 727 S.W.2d 945 (Tenn.), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987), this exact issue was raised by a defendant in a capital case. The words of the court are particularly applicable here:

“We have read the voir dire carefully and, while some jurors said their opposition to and inability to impose the death penalty, regardless of the evidence adduced, was based in whole or in part on religious grounds, those jurors were excused because their views on punishment rendered them unable to follow the law as given to them by the court and to perform their duties as jurors in accord with their oaths. That their views on capital punishment may have had a religious foundation does not necessarily transform the tests mandated by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and Wainwright v. Witt, supra, into religious tests for the purposes of the Tennessee Constitution.”

Id. at 949. See also State v. Jones, 789 S.W.2d 545, 547 (Tenn.), cert. denied, 498 U.S. 908, 111 S.Ct. 280, 112 L.Ed.2d 234 (1990) (quoting with approval from State v. Bobo).

The record reflects that prospective jurors David Fitzhugh, Estel Pace, Paul Gaskin, and Darel Kendall were all excused by the court for cause. This was premised on their expression to the court that their religious beliefs would interfere with imposition of the death penalty. Each expressed an inability to apply the death penalty even when warranted by law. Since their excusal was premised on a refusal to follow the law, an inherent duty of a juror, this issue has no merit.

CONCLUSION

Based upon a detailed and exhaustive review of this voluminous record, we have determined that no reversible error was committed in this difficult and emotional trial. The appellant’s conviction of felony murder and sentence of life imprisonment without parole is hereby affirmed.

William M. Barker, Judge

Joseph B. Jones, Presiding Judge

Gary R. Wade, Judge